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Supreme Court, U.S.
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No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DUNCAN LaPLANT,

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Wisconsin Court Of Appeals For The First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the language "any . . . other conditions . . . which constitute a substantial hazard to the health or safety of the tenant . . . " of Wis. Admin. Code § ATCP 134.04(2)(b)4. is unconstitutionally vague.

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PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS FOR THE FIRST DISTRICT

Duncan LaPlant respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Court of Appeals for the First District in this case.

OPINION BELOW

The opinion of the Wisconsin Court of Appeals is reported at 204 Wis.2d 412 and 555 N.W.2d 389 and appears herein as Appendix A.

JURISDICTION

The Wisconsin Court of Appeals entered its judgment on September 12, 1996. The Wisconsin Supreme Court entered its order denying discretionary review on November 20, 1996. See Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, §1 to the U.S. Constitution provides in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

Wis. Admin. Code §ATCP 134.04(2)(b)4. See Appendix D for full text.

STATEMENT OF THE CASE

In an amended complaint filed on March 10, 1994 in Milwaukee County Circuit Court, Mr. LaPlant was charged with 36 misdemeanor violations of the Unfair Residential Rental Trade practices regulations of the Wisconsin Department of Agriculture, Trade and Consumer Protection. (13). By statute, the Department is empowered to write regulations defining unfair business practices, see §100.20(2), Wis. Stats., and violations of these regulations carry criminal penalties. § 100.26(3), Wis. Stats.

In Counts 1, 5, 7, 15, 20, 24, 28 and 32, petitioner was charged with violating Wis. Admin. Code §ATCP 134.04(2)(b)4 which prohibits failure to disclose "any . . . other conditions . . . which constitute a substantial hazard to the health or safety of the tenant . . . "

Petitioner filed motions to dismiss the charges against him, including specifically a motion to dismiss on the ground §ATCP 134.04(2)(b)1-4 was void for vagueness. (31)(32). Petitioner's motions to dismiss were denied by written order on April 8, 1994. (10).

On June 6, 1994 petitioner entered a no contest plea to Counts 1, 6, 10, 29, 30, and 33 of the complaint and the other counts were dismissed. On June 10, 1994 petitioner was sentenced to 9 months in county jail and $1000 fine on Count 1. (1)(21). On the remaining counts, he was sentenced to 2 years probation and a $1000 fine on each count. *Id.*

The Wisconsin Court of Appeals rejected petitioner's vagueness argument. 204 Wis.2d at 423, 555 N.W.2d at 393.

REASON FOR GRANTING THE WRIT

I. The Published Opinion Conflicts with Decisions of this Court.

In a great body of precedent, stretching from *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926) down to the present with *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), see cases collected in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, fns. 3-4, 92 S.Ct. 2294 (1972), this Court has defined the reach of a Due process requirement of certainty in criminal statutes. This jurisprudence has been known as the void for vagueness doctrine ever since Professor Amsterdam's classic, though now somewhat dated, note of the same name. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). As the professor pointed out, in modern times the Court has most often used the doctrine to protect fundamental First Amendment freedoms. *Id.* at 75-85.

But there is another equally important facet to the doctrine. Where a statute punishes an omission, the Court carefully scrutinizes it to see that it is not susceptible to arbitrary enforcement by officers of the state. *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983) (failure to provide identification); *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240 (1957) (failure to register as a felon). Prevention of arbitrary enforcement has been called "the most persuasive justification for vagueness review." Jeffries, *Legality, Vagueness and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 218 (1985). See *Lawson, supra*, 461 U.S. at

358 ("the more important aspect of the vagueness doctrine" is establishing guidelines to govern law enforcement).

Here, the regulation punishes the omission of failure to disclose "any . . . other conditions . . . which constitute a substantial hazard to the health or safety of the tenant . . . " Wis. Admin. Code §ATCP 134.04(2)(b)4. Petitioner has contended in the courts below and counsel will contend in this Court such language does not provide any standards for building inspectors to follow and so is wholly arbitrary.

The opinion below dismissed this contention in one sentence. *State v. LaPlant*, 204 Wis.2d 412, 423, 555 N.W.2d 389, 393 (Ct.App.1996). This opinion conflicts with the decisions of this Court defining the vagueness doctrine. It cites none of this Court's vagueness cases and provides no analysis to support its holding. It does not even discuss whether it is likely the regulation will be applied differently by different building inspectors.

Another aspect of this case which may interest some members of the Court is the language at issue here, which subjects petitioner to criminal penalties, was not written by any elected legislators. §100.20(2), Wis. Stats. cedes to an administrative agency the power to define unfair business practices and then §100.26(3), Wis. Stats. provides criminal penalties for violating any of the regulations the agency has written. Thus, this case gives the Court the opportunity to inform administrators empowered to define crimes they will be held to the same constitutional standards as true legislators.

CONCLUSION

Counsel respectfully submits the foregoing demonstrates the petition for a writ of certiorari should be granted.

Dated: January 22, 1997

Respectfully submitted,

TIMOTHY ALAN PROVIS
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Counsel for Petitioner

APPENDIX A

STATE of Wisconsin, Plaintiff-Respondent,

v.

Duncan LaPLANT, Defendant-Appellant.†

No. 94-2362-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs June 5, 1995.

Opinion Released Sept. 12, 1996.

Opinion Filed Sept. 12, 1996.

204 Wis.2d 412

Landlord was convicted in the Circuit Court, Milwaukee County, Robert W. Landry, Reserve Judge, of unfair residential rental trade practices and landlord appealed. The Court of Appeals, Michael T. Sullivan, Reserve Judge, held that: (1) statute directing Department of Agriculture Trade and Consumer Protection to conduct statewide study of relationship between landlords and tenants was not unconstitutional private law; (2) regulations requiring landlord to disclose to tenant certain conditions in dwelling unit posing health or safety hazards were not unconstitutionally vague; and (3) residential landlord regulations did not violate equal protection clause.

Affirmed.

---

†Petition for Review filed.

For the defendant-appellant the cause was submitted on the briefs of Michael O. Bohren and Christine E. Ohlis of Milwaukee.

For the plaintiff-respondent the cause was submitted on the briefs of E. Michael McCann, District Attorney, and David M. Lerman, Assistant District Attorney, of Milwaukee.

Before WEDEMEYER, P.J., FINE, J., and MICHAEL T. SULLIVAN, Reserve Judge.

MICHAEL T. SULLIVAN, Reserve Judge.

Duncan LaPlant raises several constitutional challenges to his conviction, on a no contest plea, for six counts of unfair residential rental trade practices. *See* §§ 100.20(2), and 100.26(3), STATS. He argues that: (1) Laws of 1977, ch. 418, § 923(3), and the ensuing WIS.ADM.CODE Chapter ATCP 134, violate Article IV, Section 18 of the Wisconsin Constitution; (2) WIS.ADM.CODE § ATCP 134.04(2)(b)(1)-(4), is unconstitutionally vague; and (3) WIS.ADM.CODE Chapter ATCP 134, violates Article I, Section 1 of the Wisconsin Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We reject LaPlant's arguments and affirm.[1]

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[1] WIS.ADM.CODE Chapter ATCP 134 was originally promulgated as WIS.ADM.CODE Chapter AG 134. It was renumbered as Chapter ATCP 134 under § 13.93(2m)(b)1, STATS. All references in this opinion are to Chapter ATCP 134.

I. Background.

The Milwaukee County District Attorney's Office charged LaPlant, a residential rental landlord, with thirty-six counts of unfair residential rental trade practices.[2] The charges alleged various violations of Wis. Adm.Code Chapter ATCP 134, including: failure to disclose that rental dwellings lacked plumbing and electrical systems in a safe operating condition; failure to disclose structural or other conditions constituting a substantial hazard to the health and safety of the tenants; failure to specify the date when the promised repairs to the dwellings would be made; making promises before a rental agreement was signed promising prospective tenants that repairs would be made to the units and then failing to provide the tenant with a written copy of the promises; and failure to make the promised repairs within the time represented.

LaPlant challenged the complaint, arguing that the offenses violated the above constitutional principles. The trial court denied LaPlant's motion to dismiss and a jury trial was set. Thereafter, LaPlant pleaded no-contest to six counts of the complaint, with the remaining counts to be read-in for sentencing. After he was sentenced, LaPlant appealed to this court, renewing his constitutional challenges to his convictions.

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[2] The number of charges filed against LaPlant varied throughout the proceedings until the State, with leave of the court, amended to a final thirty-six count complaint.

II. Analysis.

We begin our analysis with the presumption that Laws of 1977, ch. 418, § 923(3), and Wis.Adm.Code Chapter ATCP 134, are constitutional and that they must be upheld unless they are proven unconstitutional beyond a reasonable doubt. *See Libertarian Party of Wisconsin v. State*, 199 Wis.2d 791, 802, 546 N.W.2d 424, 430 (1996) (constitutionality of statutes); *Richards v. Cullen*, 150 Wis.2d 935, 938-39, 442 N.W.2d 574, 575-76 (Ct.App.1989) (constitutionality of administrative rules). With this presumption in mind, we address each of LaPlant's constitutional challenges *seriatim*.

A. Article IV, § 18 of the Wisconsin Constitution.

We first address LaPlant's argument that Chapter 418, § 923(3) of the Laws of 1977, and Wis.Adm.Code Chapter ATCP 134, are private or local laws and therefore violate Article IV, Section 18 of the Wisconsin Constitution.[3] We reject this argument.

"Sec. 18, art. IV of the Wisconsin Constitution is designed to protect the public from legislative enactment of statutes whose effect is unknown to legislators and to the people of the state." *Soo Line R.R. Co. v. DOT*, 101 Wis.2d 64, 72, 303 N.W.2d 626, 630 (1981). "Section 18, art.

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[3] Section 18, Article IV of the Wisconsin Constitution provides:

> Title of private bills. No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

IV . . . expressly prohibits a private or local bill from embracing more than one subject and requires the subject of the bill to be expressed in the title." *Id.* at 70, 303 N.W.2d at 629. Hence, our supreme court has held that:

> [A] legislative provision which is specific to any person, place or thing is a private or local law within the meaning of art. IV, sec. 18, unless: 1) the general subject matter of the provision relates to a state responsibility of statewide dimension; and 2) its enactment will have direct and immediate effect on a specific statewide concern or interest.

Milwaukee Brewers Baseball Club v. DHSS, 130 Wis.2d 79, 115, 387 N.W.2d 254, 269 (1986).

LaPlant characterizes WIS.ADM.CODE Chapter ATCP 134, promulgated by the Department of Agriculture, Trade, and, Consumer Protection in February of 1980, as the "illegitimate offspring" of a study authorized by the legislature in § 923(3) of Chapter 418, Laws of 1977. We address the statute and the administrative regulation separately.

Section 923(3), provided:

> AGRICULTURE, TRADE AND CONSUMER PROTECTION. (a) Landlord-Tenant Study. The Department of Agriculture Trade and Consumer Protection shall conduct a landlord-tenant study to be completed on or before December 1, 1978. The legal research portion of the landlord-tenant study shall be conducted by the Department of Justice under the coordination of a limited term employe project coordinator provided to the Department of Agriculture, Trade and Consumer Protection.

LaPlant argues that § 923(3) was directed to one entity, the Department of Agriculture, Trade, and Consumer Protection, and therefore, it is private law violative of the state constitution. This argument is specious. Section 923(3) merely directed the Department to conduct a study which may or may not ultimately have affected a statewide class consisting of landlords and tenants. It is clear that the general subject matter of § 923(3) had a statewide dimension – the relationship between landlords and tenants throughout the state. *See Milwaukee Brewers Baseball Club*, 130 Wis.2d at 115, 387 N.W.2d at 269. Further, the enactment of § 923(3) had a "direct and immediate effect" on this statewide interest – it ordered the Department to conduct a study. *See id.* This portion of Chapter 418 of the Laws of 1977 was not an improper private bill.

LaPlant also argues that § 923(3) was an improperly titled bill that was buried in a budget bill without a definitive title, and that this violates Article IV, Section 18 of the Wisconsin Constitution. *See Soo Line R.R. Co.*, 101 Wis.2d at 77, 303 N.W.2d at 632-33 ("The law cannot embrace more than one subject and the subject must be expressed in the title.") LaPlant is correct that § 923(3) was part of a larger budget bill enacted by the Wisconsin Legislature; however, § 923(3) was not a local or private bill and therefore it need not follow the titling dictates of the Wisconsin Constitution. In sum, § 923(3) does not violate Article IV, Section 18 of the Wisconsin Constitution.

LaPlant next argues that WIS.ADM.CODE Chapter ATCP 134 is also violative of Article IV, Section 18 of the Wisconsin Constitution. He contends that this administrative code section was a sequela of the § 923(3) study and

that it was nothing more than the previously-proposed and defeated landlord-tenant legislation that found its way into Chapter ATCP. We reject this argument because Chapter ATCP 134 was promulgated by the Department of Agriculture, Trade, and Consumer Protection approximately two years after passage of § 923(3) and under separate authority than § 923(3). WIS.ADM.CODE Chapter ATCP 134 notes: "This chapter is adopted under authority of s. 100.20(2) Stats." *See* WIS.ADM.CODE Chapter ATCP 134, note. Section 100.20(2), STATS., authorizes the Department to issue "general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair." Hence, LaPlant's premise is erroneous – Chapter ATCP 134 was not enacted under the authority of § 923(3).

B. Vagueness.

LaPlant next argues that WIS.ADM.CODE § ATCP 134.04(2)(b)(1)-(4) are unconstitutionally vague.[4] The

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[4] WIS.ADM.CODE ATCP 134.04(2)(b)(1)-(4), provide:

> (2) CODE VIOLATIONS AND CONDITIONS AFFECTING HABITABILITY. Before entering into a rental agreement or accepting any earnest money or security deposit from the prospective tenant, the landlord shall disclose to the prospective tenant:
>
> . . . .
>
> (b) The following conditions affecting habitability, the existence of which the landlord knows or could know on basis of reasonable inspection, whether or not notice has been received from code enforcement authorities:

unconstitutionality of an administrative rule "must be established beyond a reasonable doubt." *Richards,* 150 Wis.2d at 939, 442 N.W.2d at 576. An administrative rule is unconstitutionally vague if it "is so obscure than men of ordinary intelligence must necessarily guess as to its meaning and differ as to its applicability." *City of Milwaukee v. Wilson,* 96 Wis.2d 11, 16, 291 N.W.2d 452, 456 (1980). A law does not have to attain the precision of mathematics of science since "a certain amount of vagueness and indefiniteness is inherent in all language." *Monroe v. Funeral Directors & Embalmers Examining Bd.,* 119 Wis.2d 385, 391, 349 N.W.2d 746, 749 (Ct.Ap. 1984). An administrative rule will withstand a vagueness challenge if it is "sufficiently definite so that potential offenders . . . are able to discern when they are approaching the

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1. The dwelling unit lacks hot and cold running water, plumbing or sewage disposal facilities in good operating condition.

2. Heating facilities serving the dwelling unit are not in safe operating condition, or are not capable of maintaining a temperature in the dwelling unit of at least 67° F (19° C) during all seasons of the year in which the dwelling unit may be occupied.

3. The dwelling unit is not served by electricity, or the electrical wiring, outlets, fixtures or other components of the electrical system are not in safe operating condition.

4. Any structural or other conditions in the dwelling unit or premises which constitute a substantial hazard to the health or safety of the tenant, or create an unreasonable risk of personal injury as a result of any reasonably foreseeable use of the premises other than negligent use or abuse of the premises by the tenant.

zone of proscribed conduct." *Schramek v. Bohren*, 145 Wis.2d 695, 708, 429 N.W.2d 501, 506 (Ct.App.1988).

LaPlant argues that the phrases "good operating condition," "safe operating condition," "substantial hazard to health and safety," and "disclose," which are peppered throughout WIS.ADM.CODE § 134.04(2)(b), are unconstitutionally vague. We disagree. From the ordinary meaning of these phrases, a landlord should not have difficulty determining when he or she is reaching the zone of conduct proscribed by the ordinance. Hence, the phrases are not unconstitutionally vague. *Id.*

We also deem meritless LaPlant's assertion that the Code provides insufficient standards for law officers to enforce it objectively. The Code sufficiently delineates landlord conduct that is violative, and provides clear standards for enforcement.

C. *Equal Protection.*

Finally, LaPlant argues that WIS.ADM.CODE Chapter ATCP 134 violates his equal protection rights under the federal and state constitution. He correctly notes that the Wisconsin Supreme Court has held that Article I, Section 1 of the Wisconsin Constitution is substantially equivalent to the equal protection provisions of the Fourteenth Amendment. *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 155 Wis.2d 184, 193, 454 N.W.2d 797, 801 (1990) (stating the equal protection clauses of the Wisconsin and United States Constitutions are substantially similar). LaPlant argues that Chapter 134 ATCP violates equal protection in two ways: (1) it creates an unreasonable classification because it regulates landlords and not

tenants; and (2) it creates an unreasonable distinction between residential landlords, regulated by the chapter, and commercial landlords, not regulated by the chapter. We reject his argument.

Unless a regulation affects a person's fundamental right or creates a classification based on a suspect class, this court uses the "rational basis test" in determining whether the regulation withstands an equal protection challenge. *See Szarzynski v. YMCA, Camp Minikani,* 184 Wis.2d 875, 886, 517 N.W.2d 135, 139 (1994). Chapter ATCP 134 does not implicate a fundamental right, nor is it based on a suspect classification – therefore, the "rational basis test" applies.

Under the "rational basis test," we must uphold a legislative classification if any reasonable basis exists to justify that classification. To decide if there is any reasonable basis, the court is obligated to find or construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds legislative determinations. *K.C. v. DHSS,* 142 Wis.2d 906, 916, 420 N.W.2d 37, 40 (1988).

The Department could reasonably distinguish between landlords and tenants in promulgating the code provisions. Regulation of a business's trade practices is a rational function of government, irrespective of any regulation of that business's customers. Further, a distinction between residential and commercial landlords is also rational given the differing nature of residential and commercial leases. There is no equal protection violation here.

Judgment affirmed.

APPENDIX B

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

DUNCAN LAPLANT,

Defendant.

ORDER DENYING MOTIONS

CASE NO.: 2-304006

(Filed Apr. 6, 1994)

Defendant's Motions to Dismiss the Complaint herein based upon violation of Article IV, Section 18 of the Wisconsin Constitution, equal protection provisions of the State and Federal Constitutions, vagueness, insufficiency of the first Complaint and Defendant's Motion to Sever the criminal counts came on for hearing on March 18, 1994 before this branch of the Milwaukee County Circuit Court;

The State of Wisconsin's Motion to File an Amended Complaint came on for hearing on March 18, 1994 before this branch of the Milwaukee County Circuit Court;

The State of Wisconsin appeared by Assistant District Attorney David Lerman and Donald LaPlant appeared personally and by Attorney Michael O. Bohren;

The court having reviewed the Briefs filed by the parties, and heard the arguments of counsel on March 18, 1994;

Upon the file, proceedings and the court being fully advised in the premises;

NOW THEREFORE IT IS ORDERED as follows:

1. Defendant's Motion to Dismiss the Complaint herein based upon violations of the equal protection provisions of the State and Federal Constitutions is denied.

2. Defendant's Motion to Dismiss the Complaint herein based upon violating Article IV, Section 18 of the Wisconsin Constitution is denied.

3. Defendant's Motion to Dismiss the Complaint herein based upon the vagueness of the underlying Administrative Code Provisions is denied.

4. Defendant's Motion to Sever the counts in the Complaint is denied.

5. Defendant's Motion to Dismiss the Complaint for insufficiency of various counts is moot upon filing an Amended Complaint.

6. Plaintiff's Motion to File and Amended Complaint is granted and the Amended Complaint is received.

Dated at Milwaukee, Wisconsin this 6th day of ~~March~~ April, 1994.

By the Court:

/s/ Robert Landry
Robert Landry
Circuit Court Judge

This document drafted by:
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APPENDIX C

(SEAL) Office of the Clerk
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To: November 20, 1996

Hon. Robert W. Landry
Reserve Judge

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You are hereby notified that the Court has entered the following order:

No. 94-2362-CR State v. LaPlant L.C. #2-304006

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Duncan LaPlant, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX D

WISCONSIN ADMINISTRATIVE CODE

ATCP 134.04 Disclosure requirements. (1) IDENTIFICATION OF LANDLORD OR AUTHORIZED AGENTS. (a) The landlord shall, except as provided under par. (c), disclose to the tenant in writing, at or before the time a rental agreement is entered into, the name and address of:

1. The person or persons authorized to collect or receive rent and manage and maintain the premises, and who can readily be contacted by the tenant; and

2. The owner of the premises or other person authorized to accept service of legal process and other notices and demands on behalf of the owner. The address disclosed under this subdivision shall be an address within the state at which service of process can be made in person.

(b) The landlord and any successor of the landlord shall keep tenants informed of any changes in the information required under par. (a).

(c) This subsection does not apply to an owner-occupied structure containing no more than 4 dwelling units.

(2) CODE VIOLATIONS AND CONDITIONS AFFECTING HABITABILITY. Before entering into a rental agreement or accepting any earnest money or security deposit from the prospective tenant, the landlord shall disclose to the prospective tenant:

(a) All uncorrected building and housing code violations of which the landlord has received notice from

code enforcement authorities, and which affect the individual dwelling unit and common areas of the premises. Disclosure shall be made by exhibiting to the prospective tenant those portions of the building and housing code notices or orders which have not been fully complied with. Code violations shall not be considered corrected until their correction has been reported to code enforcement authorities.

(b) The following conditions affecting habitability, the existence of which the landlord knows or could know on basis of reasonable inspection, whether or not notice has been received from code enforcement authorities:

1. The dwelling unit lacks hot and cold running water, plumbing or sewage disposal facilities in good operating condition.

2. Heating facilities serving the dwelling unit are not in safe operating condition, or are not capable of maintaining a temperature in the dwelling unit of at least 67°F (19°C) during all seasons of the year in which the dwelling unit may be occupied.

3. The dwelling unit is not served by electricity, or the electrical wiring, outlets, fixtures or other components of the electrical system are not in safe operating condition.

4. Any structural or other conditions in the dwelling unit or premises which constitute a substantial hazard to the health or safety of the tenant, or create an unreasonable risk of personal injury as a result of any reasonably foreseeable use of the premises other than negligent use or abuse of the premises by the tenant.

(3) UTILITY CHARGES. If charges for water, heat or electricity are not included in the rent, the landlord shall disclose this fact to the tenant before entering into a rental agreement or accepting any earnest money or security deposit form the prospective tenant. If individual dwelling units and common areas are not separately metered, and if the charges are not included in the rent, the landlord shall disclose the basis on which charges for utility services will be allocated among individual dwelling units.